

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION**

| | | |
|--------------------|---|-------------------|
| In re: |) | |
| |) | Case No. 05-21207 |
| ASARCO LLC, et al. |) | Chapter 11 |
| |) | |
| <u>Debtors.</u> |) | |

**SETTLEMENT AGREEMENT REGARDING THE
EL PASO COUNTY METALS SURVEY SITE**

WHEREAS, the United States Environmental Protection Agency ("EPA") pursuant to its authority under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675 ("CERCLA"), approved Time Critical Removal Action Memoranda for the El Paso County Metals Survey Site (the "Site") on July 10, 2002 and March 20, 2003;

WHEREAS, EPA has alleged that ASARCO, LLC, formerly known as ASARCO Incorporated ("ASARCO" or the "Debtor"), is a potentially responsible party with respect to the Site;

WHEREAS, the United States and the State each allege that EPA and the Texas Commission on Environmental Quality ("TCEQ"), respectively, have incurred certain costs of response under CERCLA in connection with the Site for which ASARCO allegedly is liable;

WHEREAS, EPA issued Unilateral Administrative Order ("UAO") No. CERCLA 6-8-05 on May 25, 2005 to ASARCO requiring it to perform certain work in connection with lead and arsenic contamination in soil at residential properties located at the Site;

WHEREAS, ASARCO filed with the United States Bankruptcy Court for the Southern District of Texas a voluntary petition for relief under Title 11 of the United States Bankruptcy Code on August 9, 2005 (the "Bankruptcy Case");

WHEREAS, the United States on behalf of EPA and the State each filed Proofs of Claim in the Bankruptcy Case (numbers 8375 and 10746 by the United States and 10450 and 10454 by the State) setting forth claims against ASARCO under Section 107 of CERCLA for various past and future response costs as defined under CERCLA in connection with the Site;

WHEREAS, ASARCO has disputed the claims with respect to the Site filed by the United States and the State as set forth in the Proofs of Claim and/or various expert reports submitted by the United States and the State;

WHEREAS, the Court established a process for estimating the claims of the United States and the State with respect to the Site, including the use of mediation;

WHEREAS, the Court has set a date for a hearing for the purpose of estimating the claims of the United States and the State with respect to the Site;

WHEREAS, having entered into mediation the parties hereto desire to settle, compromise and resolve their disputes without the necessity of an estimation hearing;

WHEREAS, this Settlement Agreement is intended to serve as a comprehensive settlement of the claims by the United States and the State against ASARCO with respect to all past costs incurred by the United States and the State for, relating to or in connection with the Site prior to May 1, 2007;

WHEREAS, in consideration of, and in exchange for, the promises and covenants herein, the parties hereby agree to the terms and provisions of this Settlement Agreement ("Settlement Agreement"); and

WHEREAS, this Settlement Agreement is in the public interest and is an appropriate means of resolving this matter.

NOW, THEREFORE, without the admission of liability or any adjudication on any issue of fact or law, and upon the consent and agreement of the parties by their attorneys and authorized officials, it is hereby agreed as follows:

I. JURISDICTION

1. The Bankruptcy Court has jurisdiction over the subject matter hereof pursuant to 28 U.S.C. §§ 157, 1331, and 1334.

II. PARTIES BOUND; SUCCESSION AND ASSIGNMENT

2. This Settlement Agreement applies to, is binding upon, and shall inure to the benefit of the parties hereto, their legal successors and assigns, and any trustee, examiner or receiver appointed in the Bankruptcy Case.

III. ALLOWANCE OF CLAIMS

3. In settlement and satisfaction of all claims and causes of action of the United States and the State with respect to any and all costs of response incurred in connection with the Site (including but not limited to the liabilities and other obligations asserted in the Proofs of Claim and other pleadings filed in the Bankruptcy Court by the United States and the State but excepting claims related to future response costs incurred on or after May 1, 2007), (a) the United States on behalf of EPA shall have an allowed general unsecured claim in the total amount of \$13,280,780 for past response costs incurred prior

to May 1, 2007, and (b) the State on behalf of the TCEQ shall have an allowed general unsecured claim in the total amount of \$419,220 for past response costs incurred prior to May 1, 2007. Distributions received by EPA shall be deposited in a Site-wide special account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund; all such distributions and notices of distributions shall be sent to the addresses provided by counsel for the United States. The TCEQ shall be designated as the recipient of all distributions to the State; all such distributions and notices of distributions shall be sent to:

The Office of The Texas Attorney General
Att : Hal F. Morris, Assistant Attorney General
Managing Attorney Bankruptcy Regulatory Section
300 West 15th Street
Austin, Texas 78701

4. All allowed claims under this Settlement Agreement shall not be subordinated to other general unsecured claims pursuant to any provisions of the Bankruptcy Code or other applicable law that may be contended to authorize or provide for subordination of allowed claims, including without limitation sections 105 and 510 of the Bankruptcy Code.

5. Although the claims granted to the United States herein are described as general unsecured claims, this description is without prejudice to the United States' alleged secured right of set-off against ASARCO's claim for tax refunds and nothing in this Settlement Agreement shall modify or waive such alleged secured claim of set-off.

6. With respect to the allowed unsecured claims set forth in Paragraph 3 for the United States on behalf of EPA, and for the State, only the amount of cash received by

each such agency (and net cash received by each such agency on account of any non-cash distributions) under this Settlement Agreement for the allowed general unsecured claims and not the total amount of the allowed claims, shall be credited by each such agency to its account for a particular site, which credit shall reduce the liability to such agency of non-settling potentially responsible parties for the particular site by the amount of the credit.

**IV. COVENANTS NOT TO SUE AND
RELEASES OF LIABILITY**

7. With respect to any and all costs of response for, relating to or in connection with the Site incurred prior to May 1, 2007 (including any and all response costs incurred prior to May 1, 2007 relating to any release or threatened release of a hazardous substance at or from any portion of the Site) and except as specifically provided in Section V (Reservation of Rights), the United States covenants not to sue or assert any civil claims or causes of action against ASARCO pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a).

8. With respect to any and all costs of response for, relating to or in connection with the Site incurred prior to May 1, 2007 (including any and all response costs incurred prior to May 1, 2007 relating to any release or threatened release of a hazardous substance at or from any portion of the Site) and except as specifically provided in Section V (Reservation of Rights), the State releases and forever discharges Debtor from any and all liability arising under or pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a); any similar state law (including without limitation the Texas Solid Waste Disposal Act, Tex. Health & Safety Code Chapter 361); and any liabilities or obligations asserted in the State's Proofs of Claim.

9. This Settlement Agreement in no way impairs the scope and effect of the Debtor's discharge under Section 1141 of the Bankruptcy Code as to any third parties or as to any claims that are not addressed by this Settlement Agreement.

10. Without in any way limiting the covenant not to sue (and the reservations thereto) set forth in Paragraph 7, or the release of liability (and the reservations thereto) set forth in Paragraph 8, and notwithstanding any other provision of this Settlement Agreement, such covenant not to sue and release of liability shall also apply to ASARCO's successors and assigns, officers, directors, employees, and trustees, but only to the extent that the alleged liability of the successor or assign, officer, director, employee, or trustee of ASARCO is based solely on its status as and in its capacity as a successor or assign, officer, director, employee, or trustee of ASARCO.

11. The covenants not to sue and releases of liability contained in Paragraphs 7, 8 and 10 of this Settlement Agreement extend only to ASARCO and the persons described in Paragraphs 7, 8 and 10 above and do not extend to any other person. Nothing in this Agreement is intended as a covenant not to sue or a release from liability for any person or entity other than ASARCO, the United States, the State and the persons described in Paragraph 10. The United States, the State and ASARCO expressly reserve all claims, demands, and causes of action either judicial or administrative, past, present or future, in law or equity, which the United States, the State or ASARCO may have against all other persons, firms, corporations, entities, or predecessors of ASARCO for any matter arising at or relating in any manner to the sites or claims addressed herein.

12. Nothing in this Settlement Agreement shall be deemed to limit the authority of the United States or the State to take response action under Section 104 of CERCLA, 42

U.S.C. § 9604, or any other applicable law or regulation, or to alter the applicable legal principles governing judicial review of any action taken by the United States or the State pursuant to that authority. Nothing in this Settlement Agreement shall be deemed to limit the information gathering authority of the United States or the State under Sections 104 and 122 of CERCLA, 42 U.S.C. §§ 9604 and 9622, or any other applicable federal law or regulation, or to excuse the Debtor from any disclosure or notification requirements imposed by CERCLA, RCRA, or any other applicable federal law or regulation.

13. Debtor covenants not to sue and agrees not to assert any claims or causes of action against the United States and the State with respect to the El Paso County Metals Survey Site, including but not limited to: any direct or indirect claim for reimbursement of response costs incurred prior to May 1, 2007 from the Hazardous Substance Superfund (established pursuant to the Internal Revenue Code, 26 U.S.C. § 9507) through CERCLA Sections 106(b)(2), 107, 111, 112, 113, 42 U.S.C. §§ 9606(b), 9607, 9611, 9612, 9613, or any other provision of law; any claims against the United States and the State, including any of their departments, agencies or instrumentalities, under Section 107 or 113 of CERCLA, 42 U.S.C. §§ 9607, 9613, relating to response costs incurred prior to May 1, 2007; and any claims arising out of the response activities at the El Paso County Metals Survey Site completed prior to May 1, 2007. Nothing in this Settlement Agreement shall be construed to constitute preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611 or 40 C.F.R. § 300.700(d).

V. RESERVATION OF RIGHTS

14. The covenants not to sue and releases of liability set forth in Section IV do not pertain to any matters other than those expressly specified therein. The United States and

the State reserve, and this Settlement Agreement is without prejudice to, all rights against the Debtor or other person with respect to all other matters, including but not limited to any action to enforce the terms of this Settlement Agreement or to assert any liability of the Debtor for any response costs and/or response actions relating to the Site incurred on or after May 1, 2007; provided, however, that Debtor reserves all rights to contest any such liability for such future response costs and/or response actions.

15. Nothing in this Settlement Agreement shall be construed to create any rights in, or grant any cause of action to, any person not a party to this Settlement Agreement.

VI. CONTRIBUTION PROTECTION

16. The parties hereto agree that, as of the Effective Date, ASARCO is entitled to protection from contribution actions or claims as provided by Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2) for matters addressed in this Settlement Agreement. The matters addressed in this Settlement Agreement include all costs of response incurred prior to May 1, 2007 for, relating to or in connection with the Site.

VII. PUBLIC COMMENT

17. This Settlement Agreement will be subject to a thirty (30) day public comment period following notice published in the Federal Register, which may take place concurrent with the judicial approval process under paragraph 17 hereof. The United States reserves the right to withdraw or withhold its consent if the public comments regarding the Settlement Agreement disclose facts or considerations that indicate that this Settlement Agreement is inappropriate, improper, or inadequate. At the conclusion of the public comment period, the United States will provide the Court with copies of any public comments and its response thereto.

VIII. JUDICIAL APPROVAL

18. The settlement reflected in this Settlement Agreement shall be subject to approval by the Bankruptcy Court pursuant to Bankruptcy Rule 9019. The Debtor shall move promptly for court approval of this Settlement Agreement and shall exercise commercially reasonable efforts to obtain such approval. If this Settlement Agreement is not authorized and approved by the Bankruptcy Court, this Settlement Agreement shall be of no force and effect, whereupon nothing herein shall be deemed an admission of any fact or waiver of any right of any Party with respect to the matters contained herein.

IX. RETENTION OF JURISDICTION

19. This Court shall retain jurisdiction over both the subject matter of this Settlement Agreement and the parties hereto, for the duration of the performance of the terms and provisions of this Settlement Agreement for the purpose of enabling any of the parties to apply to the Court at any time for such further order, direction and relief as may be necessary or appropriate for the construction or interpretation of this Settlement Agreement, or to effectuate or enforce compliance with its terms.

X. EFFECTIVE DATE

20. This Settlement Agreement shall be effective upon approval by the Court in accordance with Paragraph 18 hereof.

XI. SIGNATORIES/SERVICE

21. The signatories for the parties each certify that he or she is authorized to enter into the terms and conditions of this Settlement Agreement and to execute and bind legally such Party to this document.

THE UNDERSIGNED PARTIES ENTER INTO THIS SETTLEMENT AGREEMENT

IN IN RE: ASARCO LLC CASE NO. 05-21207:

FOR THE UNITED STATES

Date: _____

Ronald J. Tenpas
Acting Assistant Attorney General
Environment and Natural Resources
Division
U.S. Department of Justice

Date: _____

Angela O'Connell
Alan S. Tenenbaum
David L. Dain
Environment and Natural Resources
Division
Environmental Enforcement Section
U.S. Department of Justice

Date: _____

Samuel Coleman, P.E., Director
Superfund Division
U.S. EPA, Region 6

FOR THE STATE OF TEXAS

Date: _____

By: _____

Texas Commission on Environmental
Quality

Date: _____

By: _____

Hal Morris
Assistant Attorney General
Office of the Attorney General of Texas

FOR ASARCO, LLC

Date: _____

Thomas L. Aldrich
Vice President, Environmental Affairs

Date: _____

Douglas E. McAllister
Executive Vice President, General Counsel